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HEARINGS
Before A
Subcommittee of The
Committee on The Judiciary
UNITED STATES SENATE

Eighty-Second Congress
Second Session
On
S. J. RES. 130
Proposing An Amendment To The Constitution Of
The United States Relative To The Making
Of Treaties And Executive Agreements

May 21, 22, 27, 28, and June 9, 1952

TREATIES AND EXECUTIVE AGREEMENTS

TUESDAY, MAY 27, 1952

UNITED STATES SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee, met, pursuant to recess, at 10:25 a. m., in room 424, Senate Office Building, Hon. Willis Smith presiding.

Present: Senators Smith of North Carolina, Ferguson, and Hendrickson.

Also present: Wayne H. Smithey, professional staff member.

Senator SMITH. Senator McCarran has been delayed in getting in. He just sent word for me to proceed with the hearing.

I am going to now call on Mr. Bruce, Under Secretary of State, who was to be heard at 10:30, and then we will get back to the others who are listed on the agenda.

Mr. Bruce, I do not know just what Senator McCarran had in mind about procedure this morning and whether or not he had any understanding with you one way or the other. But if he did not, you could proceed in such manner as you wished to in discussing this resolution.

STATEMENT OF HON. DAVID K. BRUCE, ACTING SECRETARY OF STATE, ACCOMPANIED BY ADRIAN S. FISHER, LEGAL ADVISER, STATE DEPARTMENT, WASHINGTON, D. C.

Mr. BRUCE. Thank you, sir.

Mr. Chairman, I am sorry to have to read such a long statement. I think it will take in excess of half an hour. But after giving a great deal of consideration to this proposed resolution, we decided, as regards the State Department, that it was of such fundamental importance that we wanted to be accorded the opportunity to have a careful response to your invitation to appear before you in the record.

Senator FERGUSON. Mr. Bruce, do you cover the American Bar Association's proposal as well as the Senate Joint Resolution 130, in your remarks?

Mr. BRUCE. I touch on the American Bar Association's proposal, sir.

Senator FERGUSON. You have that in mind in making the statement?

Mr. BRUCE. Yes; we have that in mind.

I was very much struck, as will come out in the statement in part, in going over some of the questions which were raised by this very interesting resolution, with the similarity, the very fundamental similarity, between this question being discussed today and what occurred 160 years ago in the Constitutional Convention, which was commented on, as you will recall, at great length in the Federalist Papers. And in the discussion we have included a great many comments on the Federalist Papers.

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Mr. Chairman and members of the subcommittee, I should first like to express my appreciation for this opportunity to give you the views of the State Department with regard to Senate Joint Resolution 130. This proposal to amend the Constitution with respect to the treaty power of the Federal Government concerns every agency of the Government which operates in the foreign field. It concerns our Armed Forces whose operations and status abroad depend upon international treaties and agreements. It concerns our Mutual Security Administration, our Department of Commerce, and even our Post Office. But, of course, it concerns the Department of State most of all.

Mr. Chairman, the Department has already written the subcommittee that we think that an amendment to the Constitution such as proposed in Senate Joint Resolution 130 would not serve the best interests of the citizens of the Government of the United States.

This proposed amendment would alter the basic structure of this Government as established by the Constitution. It is contrary to the basic theory of separation of powers among the legislative, executive, and judicial branches of the United States Government. It would seriously curtail the treaty-making authority of the United States and prevent this Government from entering into many treaties which are beneficial and necessary to the interests of the United States and its citizens.

Senator FERGUSON. Could I inquire there if it is the contention of the State Department that the treaty-making power is now unlimited, with no restrictions whatever on it?

Mr. BRUCE. I deal with that later in the brief, sir, but if you want I could take it up at this time.

Senator FERGUSON. No. Is that your contention, though?

Mr. BRUCE. No, that is subject to the restrictions placed thereon by the Constitution, ratification by two-thirds of the present Members of the Senate.

Senator FERGUSON. And do you cover the question of agreements?

Mr. BRUCE. We do, sir, quite fully.

Senator FERGUSON. Do you distinguish between the treaty and the executive agreement?

Mr. BRUCE. We do, sir.

It would seriously interfere with the historic and fundamental functions of the Executive and the Senate in the field of foreign affairs that it would jeopardize the influence of the United States in the world today.

Any proposal to amend the United States Constitution is, of course, a very serious matter. The greatness of the United States today, the strongest and freest country in the world, is the living proof of the greatness of our Constitution and of the wisdom and foresight of the statesmen who wrote this magnificent instrument. I think, therefore, when we propose to change any part of this instrument which was so carefully worked out in Philadelphia in 1787 we should look back to see why they wrote that part as they did.

Alexander Hamilton explained quite fully in the Federalist (No. LXXV) why the treaty-making authority was conferred jointly upon the President and the Senate. This was a great exception to the general rule of the Constitution that the executive and the legislative branches of Government exercise separate and independent powers.

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But Hamilton pointed out that the power to make treaties is neither an executive nor a legislative power. He said that the objects of the treaty power—

> are contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable, in the management of foreign negotiations, point out the Executive as the most fit agent in these transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.

Hamilton was opposed, however, to giving the House of Representatives a share in the treaty-making power, on the ground that that body was too large and variable in character.

I most respectfully urge the subcommittee, in studying this proposal, to keep in mind the fundamental nature of the treaty power as so clearly expressed by Hamilton. The power of the United States Government to enter into treaties in its dealings with other governments is to this Nation what the capacity to enter into contracts is to a private individual in his business dealings with other individuals. If we are going to do business with other countries, we have to be able to make treaties. As Jay remarked, you cannot expect other nations to do business with us unless they get something out of the bargain. In considering any changes in the treaty power of the United States, we must be very careful not to "hamstring" ourselves so that we cannot make the "contracts" with other countries which we ought to make in the best interests of the United States and of American citizens. As Justice Sutherland has pointed out:

> Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens * * *; and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law (*United States v. Curtiss-Wright Export Corporation et al*, 299 U. S. 304, 318 (1936)).

We are particularly concerned about this because under article I, section 10, of the Constitution, the several States of the Union are expressly forbidden to "enter into any treaty, alliance, or confederation." If the treaty power of the Federal Government is unduly restricted, therefore, the United States will be in a position where nobody will be able to do business for it in its international relations. I shall shortly point out, in connection with specific parts of this proposal that, as now drafted, it would appear to prohibit us from making treaties which are not only beneficial but necessary to the best interests of the United States and its citizens.

Before taking up specific points, however, I want to say that we are very much disturbed by the underlying assumptions of this proposal. It assumes, first, that the President and the Senate acting together as the treaty-making authority of the United States are going to abuse the treaty power. Thus, in introducing this resolution of February 7, 1952, Senator Bricker described as a "constitutional loophole" the fact that—

> By a ruthless exercise of the treaty-making power a President, with the support of two-thirds of the Senators present and voting, could revolutionize the relationship between the American people and their Government as prescribed by the Constitution (Congressional Record, p. 921).

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Later on in the same debate, Senator Bricker stated:

> By misuse of the treaty power it is possible for the President and the Senate to transfer to Washington all the powers reserved to the States by the tenth amendment. I do not see how any such abuse can be prevented. (Congressional Record, p. 925).

This proposal thus is based upon fundamental distrust of the intelligence and integrity of both the President and the United States Senate. In addition, it is based upon distrust of our courts, as Senator Bricker also implied in introducing this resolution that he did not trust our courts to protect the constitutional liberties of American citizens. If the situation is indeed this bad—that the President and the Senate will conspire to alienate the traditional liberties of American citizens and the courts will supinely acquiesce in this—I am afraid that the enactment of a constitutional amendment will not help matters much.

Senator FERGUSON. I would just like to ask some questions there.

This is not a question of trust, is it? When the original Constitution was made, it was not a question of the people trusting the executive and the legislative, was it?

It was a question of sovereignty being in the people, and that they were forming a limited government; that is, the States were reserving sovereignty except where given to the Federal Government.

And as we have progressed, we are finding that when the United Nations Treaty was made there are many claims now that were not part of at the time that the treaty was approved, particularly when it referred, in the treaty, to the point that domestic matters were not to be altered by it.

And then we find lawyers presenting the claim that there have been alterations, that there has been a change in the sovereignty of the State.

For instance, in the California case; and again when they introduced the one bill here on civil rights, it was the claim that the whole fabric of our Constitution had been changed by this treaty.

Do you discuss that?

Mr. BRUCE. Yes; we do, sir. We deal with the California case later on, and also with the civil rights question.

Senator FERGUSON. But it is not a question of trust, is it? It is a question of the whole idea of the Constitution, which is one of reserving these rights in the people.

It was not that they distrusted the officials when they said, "You are entitled to a jury trial, and you cannot have unreasonable seizure." Was it a question of distrust?

Mr. BRUCE. It was not a question of distrust as it affected the past, Senator, but let me say this.

At the time of the formation of the Constitution, this whole question as to whether the treaty powers should be conferred upon the Executive and both Houses of Congress was debated extensively, as you will recall. Gouverneur Morris, that extremely able man, was a proponent of having the House of Representatives join in with the Senate in a consideration of any treaty making. By a vote of 8 to 1 in committee, the proposition made by Gouverneur Morris was rejected. Several times thereafter in the course of consideration of the formation of the Constitution the same thing was brought up, and it seemed to be the opinion of everyone—when I say "everyone" I

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mean almost everyone who participated in that Convention—that as this entered into a very debatable ground between the legislative and the Executive, the only way in which expeditiously and efficiently you could conduct the foreign relations of the United States was through having the Executive take the initiative, subject to the eventual check of the Members of the Senate, with the reservation which also was debated very frequently, that as the requirement of ratification or approval of the Executive's action by a majority of the Senate would lead to some very strange occurrences depending upon the number of Senators present, at least it was agreed it should be by two-thirds of the Members present.

Now, to get back to another thing which you spoke of: The reservation at the time of the delegation to the Federal Government of those powers which were necessary for the conduct of the Federal Government by the States; that is, a reservation to the States of those powers not delegated to the Federal Government, made the issue of States' rights for a large part of our history, of course, a very important one to the individual States concerned.

I don't need to labor that point. But at the same time, the treaty-making power conferred upon the Executive and the ratification necessary by the Senate also delegated to this central body an authority, as the result of making the treaty, to override the States, either taken corporately, or the individuals of the States, as they might be affected by State legislation.

Senator FERGUSON. Well, do you think that today the treaty-making power could take the right away from the States of having a republican form of government?

Mr. BRUCE. No, not possibly, because the republican form of government is granted by the Federal Constitution.

Senator FERGUSON. Well, but then, is it not also true that of equal importance is this treaty-making power? That is the reason I asked you the original question as to whether or not you contended that the treaty-making power was supreme that there was no limitation upon it.

Mr. BRUCE. There is a great limitation on it, sir, in this respect: That first of all, the treaty-making power is limited by the Federal Constitution; secondly, the treaty-making power is limited by a Federal statute. If that statute is passed or comes into effect after the making of a treaty, the only case in which the treaty overrides, as the supreme law of the land, any article which guarantees the right of a citizen—and I want to hedge those words a little later—is when that treaty is superior to a State constitution, a State court, or the rights of a citizen as expressed in his State law.

But remember that there has never been but one case, as far as I know, of a treaty entered into by the Federal Government which has ever been questioned constitutionally in the courts.

Senator FERGUSON. Going back to the question where you said that the treaty-making power was limited by the Constitution: Is it not that the legislative is limited by the Constitution but the treaty-making power under the present Constitution is limited only by the powers of the United States?

Mr. BRUCE. By the powers of the Federal Government, by the powers of the Federal Constitution, by the powers of the Supreme Court, and also by the power of Congress, which, if it enacts some-

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thing legislatively, after the entry into force of a treaty, possesses, if there is a contention between them, a prior authority over that embodied in the treaty.

Senator FERGUSON. It is your contention, then, that a legislative act can repeal a treaty?

Mr. BRUCE. Not repeal it. I will have to call on the legal adviser of the State Department on that one.

Senator FERGUSON. I want to know if that is your contention.

Mr. FISHER. It is the view of the Department, as I understand it, sir, that a legislative act ente ' into subsequent to a treaty is binding as the law of the land.

There is a legislative presumption expressed by Justice Brandeis in the case of *Cook* v. *United States* that, absent an indication that the Congress intended so to do——

Senator FERGUSON. Suppose they expressly did it?

Mr. FISHER. If the Congress expressly made it clear, to override the presumption I pointed out, that I think you understand, sir——

Senator FERGUSON. Yes, I understand.

Mr. FISHER. That we intend this to be the law of the land irrespective of any prior treaty, while that does not excuse the United States in an international forum from the charge of treaty violation——

Senator FERGUSON. So if we gave an international court the right to try our citizens, then that would not be revoked by any act of Congress.

Mr. FISHER. May I finish the answer to the question, sir?

The question is that insofar as the law of the land goes, insofar as the law to be enforced in the courts of the United States goes, the subsequent act of Congress prevails, subject only to the prior indication that in the absence of clear evidence you assume that the Congress intended to comply with the prior treaty.

But if the Congress says, "This is what we intend to govern the conduct of American citizens, and we believe this is the law to be enforced in the courts of the United States, irrespective of any prior international commitment," there is in my judgment no question but what that law will be enforced in the courts of the United States.

Senator SMITH. You presuppose, of course, that this is a legislative enactment, which would require a majority of both Houses and the signature of the President on the act?

Mr. FISHER. That is right, sir.

Senator SMITH. Therefore, the President still has power by authority of his veto to thwart the will of the legislative branch of the Government. Would that not be true?

Mr. FISHER. That is true, but I would assume that in terms of legislation, the function of veto is one which the constitutional framers had in mind when they enacted the Constitution.

Senator SMITH. Of course, it might be determined as to whether that would be an attack on the legislative process.

Mr. FISHER. It might be determined by a variety of factors, sir.

Senator HENDRICKSON. If that is the law, why not spell it out constitutionally?

Mr. FISHER. I think it is so clearly accepted by the Supreme Court, sir. I haven't got the Cook case in front of me, but I am sure that reading the cases it cites——

Senator SMITH. Will you let the committee get your identification, for the benefit of the reporter?

Mr. FISHER. My name is Adrian Fisher, sir, and I am the legal adviser of the Department of State.

Senator SMITH. Go ahead, Senator. Excuse me.

Senator HENDRICKSON. That is all right. I just wanted an answer to that question.

Mr. BRUCE. This matter is covered, not quite as extensively, later on in this paper, sir.

Senator SMITH. I wonder, to center our attention on what we really are talking about, whether it might not be appropriate to read the first three sections we are talking about before we get to the executive agreement.

This is the proposal:

SECTION 1. No treaty or executive agreement shall be made respecting the rights of citizens of the United States protected by this Constitution, or abridging or prohibiting the free exercise thereof.

Now, in simple language that just means that, as to the rights which American citizens now have, as citizens, and protected by the Constitution, no treaty or executive agreement shall be made abridging or prohibiting the exercise of those rights.

Now, what is wrong with that language right there?

Mr. BRUCE. Mr. Chairman, I think maybe I had better skip some of the intervening language and take off at that point, to state what we believe is wrong with what appears to be simple language.

Senator SMITH. That is what I want to get at.

Mr. BRUCE. So suppose I just go a little ahead of my testimony.

Senator SMITH. We do not want to interrupt your process.

Mr. BRUCE. No, sir. This is very helpful.

Senator SMITH. If you prefer, we can go back and let you proceed as you intended.

Mr. BRUCE. No, sir; because this will be laid before you in toto, and maybe it will save time and be more pertinent if we take up this matter now.

The first difficulty is caused by the phrase "respecting the rights of citizens of the United States protected by the Constitution." The rights of citizens of the United States protected by the Constitution include not only the traditional rights of free speech, free press, and so forth, but also economic rights, such as the right to engage in a business or profession and to own property. The vague word "respecting" leaves the proposed amendment open to the interpretation that it is meant to cover treaties dealing with the exercise of these rights anywhere, not merely with their exercise in the United States by citizens of the United States. As an example of the effect which this would have, let us look at article I of the Treaty of Friendship, Commerce, and Navigation between the United States and Italy which entered into force in 1949. Paragraph 2 of article I provides that the nationals of either State shall, within the territories of the other State, be permitted, without interference, to exercise in conformity with the applicable laws and regulations, the following rights and privileges upon terms no less favorable than those now or hereafter accorded to nationals of the other State:

(a) To engage in commerce, manufacturing, processing, financial, scientific, educational, religious, philanthrophic, and professional activities except the practice of law;

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(b) To acquire, own, erect or lease, and occupy appropriate buildings and to lease appropriate lands, for residential, commercial, manufacturing, processing, financial, professional, scientific, educational, religious, philanthropic, and mortuary purposes—

that is in reference to the treaty of friendship, commerce, and navigation.

I would say that the above treaty certainly is one "respecting the rights of citizens of the United States protected by the Constitution," although it was intended to aid our citizens in carrying on foreign trade and commercial activities in Italy. As section 1 of the proposed amendment is drafted, we could not enter into treaties of this character.

The subcommittee will recall that a somewhat similar treaty of friendship, commerce and navigation came into force in 1950 between the United States and Ireland. The Senate Foreign Relations Committee now has before it for consideration similar treaties of friendship, commerce, and navigation with Colombia, Denmark, and Greece. These treaties are all intended to replace very old treaties of friendship and commerce with these countries, all concluded over a hundred years ago, so as to modernize the basis upon which our citizens can engage in business and occupations abroad and receive protection of their persons and property abroad. Section 1 of the proposed amendment would prohibit this sort of treaty.

The point that we are making there, sir, is that this would be a prohibition against the application of treaty provisions not only affecting citizens in this country, but the rights of our citizens in foreign countries, the protection of which has been asserted by the entry into treaty relationships with foreign governments in literally dozens of cases, and which have given rise to an infinite complexity of legal disputes, discussions, and what not, until the treaty has finally settled the rights of American citizens, for example, owning property abroad, and the rights of foreign citizens owning property in this country.

Senator SMITH. The way I read that is this:

No treaty or executive agreement shall be made respecting the rights of citizens of the United States protected by this Constitution—

Well, now, why should not the rights of any citizen protected by the Constitution be prevented from being infringed upon by a treaty or by an executive agreement?

As I understand, you object to the word "respecting," but I call your attention to the language of the first amendment to the Constitution. And there they use the very word you are objecting to: "Congress shall make no law respecting an establishment of religion." Now, they use the word "respecting" in much the same sense that I understand the meaning to be here.

Of course, I may be wrong in my interpretation as to the word "respecting." But why is it that the word "respecting" should not be treated in the same manner as it was treated in the first amendment to the Constitution?

Mr. BRUCE. Mr. Chairman, with your permission, that is a question to which the legal adviser has addressed himself, and if I may be permitted, I would like him to answer it.

Mr. FISHER. Mr. Chairman, the view on that which we submit is this: It would appear to me that in enacting the first amendment the

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purpose of the enacters was to completely divorce the church and state. I know when you make that broad statement you get lots of questions that come as a result of it. But the general policy, they wanted to say, was that on the whole the church and the state should stay apart. And for that reason a loose word like "respecting" is a pretty good word to use in language of prohibition.

In other words, this is designed to indicate there should not be any relationship.

I do not believe that the problem is analogous. I do not believe, for example, that we should say that it is not a function of the foreign policy of the United States to try to protect, where that is possible, rights of this kind.

Now, where the purpose is to have a complete divorcement, it seems to me the word "respecting" is a word well taken. Where the purpose is only to insure that certain rights will not be curtailed, it would appear to me that the word "respecting" is fraught both with danger and possible mischief. I use the word not in a purposeful sense, but in a sense of danger.

Senator SMITH. You mean that when you say "respecting the rights of citizens" you do not think that is a proper use of language to describe having nothing done that would affect the rights of citizens?

What other word would you suggest instead of "respecting" there?

Mr. FISHER. Well, sir, later in the statement the question is dealt with, and I think with the chairman's permission we might come to that in order.

As to what the problem would be if the suggestion that I understand Judge Phillips made, that the word "respecting" be eliminated and either the language of the bar association amendment or the language of this amendment, merely relating to "not adversely affecting," should be kept, I think that is dealt with in about two pages, sir.

Senator SMITH. As I understand it, it is your contention, then, that it ought to be possible and permissible for a treaty or an executive agreement to be made that did affect the rights of citizens protected by the Constitution, to change those rights?

Mr. FISHER. Sir, when you say "respecting the rights" and say "change those rights," it appears to me you are saying two different things.

Senator SMITH. Well, of course, I am saying two different things.

Mr. FISHER. It seems to me that we should have the right to enter into treaties which enforce and support——

Senator SMITH. Now, when you say "we," whom do you mean by "we"?

Mr. FISHER. The United States Government acting by the procedure set up by the Constitution, which is the Executive negotiating a treaty ratified by the advice and consent of two-thirds of the Senate.

Senator HENDRICKSON. Mr. Fisher, I take it from your remarks that you prefer the language, if you had a choice to make, of the bar association resolution?

Mr. FISHER. Sir, that is dealt within such detail that I would rather let the statement speak for itself. That is not to give you a fair answer, sir, but I am afraid that attempting to do so would cut across a rather elaborate presentation of it.

Mr. BRUCE. Heading into what I think you would have in mind, the Genocide Convention and the human-rights business, which is cov-

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ered in quite a lot of detail here, I assume that is part of what you had in mind?

Senator SMITH. I assumed we would eventually get around to that. But I was going to ask Mr. Fisher, then:

You prefer the American Bar Association provision?

Mr. FISHER. No, sir. In this particular context there are three separate questions, it seems to me, which are dealt with in the statement in some detail. That is, whether or not an amendment should use the word "respecting" the rights of American citizens; the question as to whether or not an amendment limiting itself to the provisions of "adversely affecting" rather than "respecting" would cut across the doctrine most recently expressed by the Supreme Court in the opinion by Justice Butler, I believe, in Asakura versus Seattle; and thirdly, the question of whether or not, in view of the way that doctrine was stated by Justice Butler, a constitutional amendment which is phrased in the terms that the American Bar Association amendment is phrased in does not go considerably further than is necessary; or whether or not, in view of the way Mr. Justice Butler phrased this doctrine, any amendment at all is necessary.

Those seem to me to be a series of separate questions.

Senator SMITH. You are referring to Mr. Justice Pierce Butler?

Mr. FISHER. Yes, sir.

Mr. BRUCE. And frankly, we prefer no amendment.

Senator HENDRICKSON. Yes; that is obvious.

Mr. BRUCE. I don't know whether it is.

Senator SMITH. All right.

Now, the next one:

SEC. 2. No treaty or executive agreement shall vest in any international organization or in any foreign power any of the legislative, executive, or judicial powers vested by this Constitution in the Congress, the President, and in the courts of the United States, respectively.

Now, that seems to me to be one I cannot answer, but I am trying to see what sort of answer you would give, if you contend that a treaty or an executive agreement might be made that would alter or abridge the laws of the United States or the Constitution, or the laws of the several States.

Now, just what is your view? You say we should allow an international organization or a foreign power to have the power to perform a function of that sort that would be contrary to the Constitution of the United States, as set forth in section 2?

Mr. BRUCE. Well, we consider that the provisions in that particular section are extremely unclear. And there are two different things, two different arguments, that one might present against it.

We do not believe that its enactment would be useful or would contribute to the cure of the ills, whether real or fancied, which are in the minds of the framers of this resolution. And if you will permit me, I will deal with that, sir.

Senator SMITH. All right, sir.

Mr. BRUCE. Section 2 of the proposed constitutional amendment provides the language that you have read.

The implications of this proposed section are indeed unclear. One possibility is that the section has been proposed because the Constitution as it stands today permits the transfer by treaty of legislative,

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executive, or judicial powers of the United States to an international organization or foreign power. Such a conclusion would certainly be extraordinary. The executive branch of the Government has never proceeded on the basis of such an assumption in conducting our foreign affairs. The United States has never entered into any treaty or executive agreement purporting to vest the legislative, executive, or judicial powers under the Constitution of the Congress, the President, or the courts of the United States in any foreign power or international organization, and it is not intended to enter into any such treaty or agreement.

It may be, therefore, that the proposed section 2 in Senate Joint Resolution 130 would not bring about any change in the Constitution and would not accomplish anything. Thus it may be a proposal simply to insert surplusage.

On the other hand, it may be that the proposed section 2 is aimed to strike at proposals for international treaty or agreement of a type not involving transfer of constitutional powers of government from the United States but which have been criticized on the ground of engaging the United States in excessive participation in world affairs today. For example, section 2 may conceivably be directed at such an international undertaking as the Baruch proposals for the international control of atomic energy. These proposals, which have been approved by a great majority of the United Nations—aside from the Soviet bloc—include provision for an international authority to own and manage atomic production facilities. If the proposed constitutional amendment is designed to render constitutionally impossible an effective international control of atomic energy under the Baruch proposals, for purposes of world security and the development of peaceful applications of atomic energy, obviously the amendment is not acceptable.

Another example that comes to my mind is the proposal advanced recently by Mr. John Foster Dulles for an international striking force to guard against Soviet aggression. Under Mr. Dulles' proposal there would be continuous United Nations observation of certain frontiers to determine the occurrence of armed aggression; when such aggression occurred, the striking force would be used instantly against the aggressor, by common consent given in advance by constitutional and United Nations processes. Thus, under this plan, if armed attack occurred, the Armed Forces of the United States and of other participating countries would automatically be committed to all-out military action against the aggressor. While a proposal such as this may be open to some very serious objections, I do not think we ought to guard against such possible dangers simply by writing an amendment into the Constitution. Indeed, I do not think any constitutional amendment which would prohibit such a plan should be adopted, because of the increased sense of security which it would give to potential aggressors concerning the national attitude and policy of the greatest free country in the world.

Now, we rest our case on those statements in regard to that particular provision only, and also on the fact that the language is unclear, its implications are vague, its purposefulness is certainly questionable, and its utility in our perhaps biased opinion is valueless.

Senator SMITH. Mr. Secretary, I can see how the term "international organization" might be a little bit uncertain in its meaning, although

it may be clear to others and may be made clear to me. But when you say "or in any foreign power," now, I do not imagine you mean to suggest that any of the legislative, executive, or judicial powers of the United States should be vested in any foreign power and they should be allowed to perform any of the functions of the legislative, executive, and judicial; do you?

Mr. BRUCE. Mr. Chairman, I don't. But if I may make a layman's observation on this particular provision, it does seem to me that if one feared that the Executive were going to run riot in abridging the rights of American citizens by entering carelessly or even designedly into treaties which were going to be harmful to the exercise or the maintenance of the rights of American citizens, we would be faced with a situation which actually does not exist. I cannot, if I may be respectful about it, for the life of me understand why a group of Senators in the United States Senate would want to share the responsibilities which they presently exercise in the treaty-making field with another organization—that is, another House of the Congress—when you realize that if that were done it would be practically impossible for the Executive, acting by and with the consent of the Members of the Senate, to carry out the ordinary routine duties of the office of the Commander in Chief, who, at the same time, is the President of the United States.

I speak of that because we have had occasion to see what happens in other countries when the process of entering into a treaty is one where you are not certain of ratification ultimately by the parliament of that country.

Now, here anyone who represents the United States in the executive branch knows perfectly well that a commitment in this respect is a tentative commitment, that the carrying into effect of that commitment depends upon the assent given to it ultimately by two-thirds of the Members of the Senate present at the time of the vote.

On the other hand, if, because of time alone, if for no other reason, when you are negotiating with a foreign nation, that nation is on notice that the process of treaty ratification, of treaty implementation, is necessarily going to be so slow and is going to be so protracted—I give you as an instance the possibility of the Congress being in recess—is going to be so protracted that not only does the Senate have to give its advice and consent, but then you go through a further process where the Senate all over again considers the same, and the House of Representatives considers it, you simply will not arrive at treaty making in a manner which is going to induce confidence in the people with whom we are dealing or any efficiency in the conduct of this great treaty-making power.

There is nothing new in what I have said. It was debated exhaustively not only 160 years ago, it has been debated exhaustively ever since.

But, again, if I may say so, speaking very respectfully about the Senate, it is a marvel to me why Senators who, after all, comprise a fairly tight body, who can be summoned into session with not too much difficulty, would want to disperse this authority. Admittedly, the authority of the Senate is limited by the initiating power, the initiative which must be taken by the Chief Executive in the formulation of, in the negotiation for, a treaty; but, in the last analysis, you have already got, the legislative branch of the Congress has, complete

control over it; and the separation of the powers of government—the executive, the legislative, and the judicial—has in this instance run into a situation where very obviously the Congress—the legislative branch—has a direct interest in what the executive branch does, for that was the way it was established by the Constitution. No particular case has, so far as I know, been brought up in the course of this hearing which would show that there has been an abuse of the treaty-making power, that there has been an abuse by the Senate, in the way of blind ratification of treaties harmful to the interests of either the United States, speaking generally, or of United States citizens in particular.

Senator SMITH. Mr. Secretary, as I understand your last remarks that you made, you are pointing them to section 4, which deals with the subject of executive agreements, because there is no proposal to change the system of treaty ratification, as I understand, in this amendment at all.

The only place in which the House of Representatives, as you referred to, could come into the picture, as I see it, was with respect to the suggestion that in the case of executive agreements it requires secrecy—requires that the President should submit them to appropriate committees of Congress in lieu of publication.

I do not understand that that affects the treaty end of it at all.

Mr. BRUCE. In answer to that, may I read you section 3 of the proposed amendment? It says that no treaty or executive agreement shall alter or abridge the laws of the United States or the Constitution or laws of the several States, unless, and then only, that the Congress shall so provide by joint resolution.

That brings both Houses of Congress into it.

Senator SMITH. That is with respect to the effect that would be given to treaties under executive agreements. That is what you referred to there.

Mr. BRUCE. But I had understood from you that you were speaking of this being only applicable to executive agreements.

Section 3 specifically provides "no treaty or executive agreement."

Senator SMITH. I thought from the language of your discussion you were pointing it to section 4 because of the appropriate committees of Congress mentioned there.

Mr. BRUCE. It applies also to section 4. I am getting around in a rather verbose way to section 4.

Senator SMITH. That is probably my fault, for jumping to that myself.

Mr. BRUCE. I think now we had better take on the American Bar Association.

Senator HENDRICKSON. I would like that.

Mr. BRUCE. I am aware that some of the proponents of the proposed amendment have agreed that the clause "respecting the rights of citizens of the United States protected by this Constitution" might perhaps be eliminated. This would limit the section to provide that no treaty or executive agreement shall be made abridging or prohibiting the free exercise of rights of citizens of the United States protected by this Constitution. In this connection, attention has been directed to an alternative amendment recommended by the house of delegates of the American Bar Association which reads as follows:

> A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal

law in the United States only through legislation by Congress which it could enact under its delegated powers in the absence of such treaty.

I think it advisable to consider this in conjunction with section 3 of the proposed constitutional amendment which reads as follows:

> No treaty or executive agreement shall alter or abridge the laws of the United States or the Constitution or laws of the several States unless, and then only to the extent that, Congress shall so provide by act or joint resolution.

These various provisions have been stated together for the purposes of completeness because they have a close relation to each other. It is, however, necessary to point out that these various proposals contain three separate and distinct legal issues. The first of these is the extent to which the Federal Government may properly enter into treaty relations concerning a subject which is not within the delegated powers of the Government in the absence of such treaty.

The second is whether a treaty can abridge or prevent the free exercise of a right guaranteed to a citizen by the Constitution of the United States. The third is the extent to which a treaty should be the law of the land, immediately upon its coming into effect, without further action by Federal or State legislatures.

It is particularly important, for the purposes of clarity, to analyze closely the relationship between the first and second questions of law, since they may appear to overlap when the claim is made that citizens of the United States have a constitutional right not to be subjected to Federal regulation in a field which is not within the ordinary jurisdiction of the Federal Government in the absence of a treaty.

Let us look at the first question. Article II, section 2, of the Constitution provides that the President—

> shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.

Article VI of the Constitution provides that—

> All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

It has been universally held by the Supreme Court that the Federal Government has the power to enter into and carry out treaties relating to matters of international concern regardless of whether the subject matter of these treaties would have been within the delegated powers of the Federal Government in the absence of such a treaty. The case usually cited for this principle is *Missouri* v. *Holland* (252 U. S. 416), decided by the Supreme Court in April 1920. The principle, however, goes back to the very foundation of the Republic.

One of the earliest treaties which the United States entered into was the treaty of 1783 terminating the War of the Revolution. That treaty provided, among other things, that—

> It is agreed that creditors, on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts, heretofore contracted.

The effect of the treaty was attacked by a Virginia debtor who had paid his debt to the Commonwealth of Virginia as provided by State law. The treaty was upheld by the Supreme Court in the case of *Ware* v. *Hylton* (3 Dall. 199 (1796)). Similar provisions were in-

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serted in the Treaty of Friendship, Commerce, and Navigation concluded with Great Britain in 1794.

Throughout its history the United States has entered into many treaties on the same constitutional basis. For example, treaties of friendship, commerce, and navigation contained reciprocal guaranties with respect to real property rights of the respective nationals in each other's countries, especially in connection with the right to inherit and dispose of property and the proceeds thereof. Treaties also provided for the reciprocal right of aliens in this country and Americans abroad to engage in trade and related activities, manufacturing and professional activities. They have provided for national treatment as to taxation and for the exemption of consular officers of other nations from taxation. They have provided for the regulation of migratory birds and other wildlife and have provided for the regulation of fisheries.

I shall not take the time of the subcommittee to take up these treaties in detail, but instead place in the record a memorandum listing a number of such treaties and summarizing their provisions. In a vast number of these cases the commitments made by the United States deal with matters which, in the absence of treaties, are subject to the jurisdiction of the several States. Yet the United States had to make these commitments for the United States as a whole if it wished to obtain similar rights for its own citizens abroad. The authority of the United States to make these commitments has been upheld. To change this constitutional doctrine, maintained since the early days of the Republic, would substantially weaken the authority of the Government to carry out its foreign relations. If it were changed, the ability of the United States to cope with so important a problem as that of narcotics control, for example, would be gravely impaired.

Now, I hate to wish on you this thing about narcotics control, but it is so much in point at the present time that, if I might, I would like to deal with it in a couple of pages.

The United States became a party to the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotics Drugs in 1932, after President Hoover and Secretary Stimson urged that it be ratified not only because of its humanitarian aspects but because of the benefits to the United States. This Convention provides not only for the regulation of international traffic in narcotic drugs but also for regulation of the internal manufacture of such drugs in each contracting State. Thus, in the United States, we now regulate strictly the exports and imports of narcotic drugs and we also limit the manufacture of drugs through Federal license and careful periodic inspection of plants, inventories, and records by Federal narcotics agents. In 1950 we also became party to the protocol of November 19, 1948, to the 1931 Convention, which protocol was designed to bring the manufacture and distribution of the new synthetic drugs under this control system.

It is not necessary to emphasize the gravity of the social problem of illicit traffic in narcotic drugs in the United States. The daily newspapers headline that. Here is an international problem of first magnitude. We know that the United States is the chief objective of the illicit international traffic in narcotics. We have reported to the United Nations this year that the principal sources of illicit raw

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opium in the United States are India, Turkey, Iran, and Mexico. Heroin has been coming in illegally from Italy, although following the action of Italian authorities in curtailing the manufacture of heroin there has been a noticeable lessening of available supplies of illicit heroin. Most of the illicit marijuana seized here came from Mexico and was confiscated on the Mexican border and the Pacific coast. The Mexican authorities are endeavoring to stamp out the illicit production of marijuana.

Clearly, however, we cannot expect other governments to cooperate in this international effort to suppress illicit manufacture of narcotic drugs, if we do not take similar measures with our own citizens.

The constitutionality of measures we took to enforce this convention was challenged in *Stutz* v. *Bureau of Narcotics* (56 F. Supp. 810 (N. D. Calif. 1944)). There the court refused to enjoin the Federal authorities from seizing and destroying a privately owned crop of poppies which had been grown without Federal license. The Federal authorities were acting under the Opium Poppy Control Act of 1942 (21 U. S. C., sec. 188) which the Congress had enacted—

> to discharge more effectively the obligations of the United States under the International Opium Convention of 1912, and the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs of 1931.

Had the act been held beyond the Federal power as it might be under section 3 of the proposed constitutional amendment and as it probably would have been under the Bar Association proposal since the act went outside the field of interstate and foreign commerce, the United States would be powerless to give effect to a treaty like the Narcotics Convention.

Senator SMITH. Could it not obtain the same objective by legislative enactment here in our own country, that would have controlled?

Mr. BRUCE. No. Because without a treaty we couldn't have had the cooperation, or without a series of treaties in fact, of the other countries, who after all are the chief sources of supply for the illicit production of these drugs.

Senator SMITH. I was pointing my remark to the statement I understood you to make about the cultivation of poppies in whatever State it was.

Mr. BRUCE. California.

Senator SMITH. Now, that is something we could have dealt with by domestic legislative enactment, could we not?

Mr. BRUCE. Yes; we could. But how do you deal with the transfer from the production stage of the poppy in the field to the transit of the resulting drug? You can't do that by State enactment. That is covered by Federal statute.

Senator SMITH. I said "domestic." I meant "Federal."

Mr. BRUCE. Then, having had, Mr. Chairman, your Federal statute which, after all, only takes care of the domestic issue, what we could do in theory, I suppose, in this regard, would be to make illicit the entry into this country, the importation into this country, of any narcotics coming from a foreign country, except under certain restrictions. But by international agreement we get our control exercised other than in the United States alone. As for our narcotics agents, I don't think there is anything secret about them. They are stationed very widely throughout the whole world, and under the

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provisions of, and exercising their responsibilities as a result of, negotiations which have resulted in treaty understandings between ourselves and the countries affected. I do not want to go further into the narcotics business, except to say that I think if one were to question Harry Anslinger, the head of the enforcement agency, though I have never asked him about it, my guess would be that he would say that through a treaty it would be impossible for him to control the narcotic trade the way he has been successful in doing.

Senator SMITH. May I ask you one question right there, Mr. Secretary, if I may? Under section 3, in dealing with the situation which you have just been discussing, you attach no importance to the language "and then only to the extent that, Congress shall so provide by act or joint resolution"? In other words, would it not be possible for Congress by act or joint resolution to take care of the situation which you were discussing right now?

Mr. BRUCE. Well, we were coupling section 1 and section 3 together in this particular statement. But I would say that it was possible theoretically, if you want to go through the amendment of the Constitution, for both Houses of Congress to enact the legislation and to ratify treaties that might be entered into regarding your control of narcotics.

Senator SMITH. No; I did not mean that. I meant whether or not this provision in section 3, the section, again, reading:

> No treaty or executive agreement shall alter or abridge the laws of the United States or the constitution or laws of the several States unless, and then only to the extent that, Congress shall so provide by act or joint resolution.

Now, if Congress did by act or joint resolution, then would not that take care of the situation in the main that you were talking about with respect to narcotics insofar as they were an American concern?

Mr. BRUCE. I have exhausted my knowledge of narcotics.

I will have to fall back on Mr. Fisher.

Mr. FISHER. Mr. Chairman, the question it raises there is the question whether or not the control of the domestic production solely in the State of California, which was the case presented in Stutz against the Bureau of Narcotics, is action within the authority of the Federal Government, whether you can say that you cannot grow poppies in the State of California, cannot grow opium poppies. That question was presented to the court. The court went on the other question. It did not answer that. There has been no decision to that effect.

Senator SMITH. Was there a legislative enactment?

Mr. FISHER. Yes, sir; there was. But it apparently assumed in its decision that without a treaty this legislative enactment would have not been within the constitutional powers of the Federal Government.

Senator SMITH. You do not yourself believe that Congress would not have the power to act in a case of that sort even under this amendment, do you, by act or joint resolution?

Mr. FISHER. Under the Senate amendment, it depends upon what construction you give to the rights of citizens of the United States, or abridging or protecting their exercise. Under the Bar Association amendment, the question would be whether or not domestic control of opium poppy production in the State, without any evidence of

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out-of-State shipment, is a matter within the delegated powers of the Federal Government.

The court, which made its decision upholding that action, apparently assumed that it would not be within those powers, because it based it solely upon carrying out an international obligation.

Senator SMITH. But that was just one way out. You still have several other clauses of the Constitution you could have fallen back on, could you not?

Mr. FISHER. It seems to me, sir, the fact that the court——

Senator SMITH. Would not the general welfare clause have had a little to do with the distribution of narcotics in America, do you think?

Mr. FISHER. The fact that the court put it on this ground, which has been a ground which has been the subject of some controversy over a period of time, rather than the ground which you apparently feel is simpler, indicates that the court did not share your views.

Senator SMITH. No. Of course, we all know what the court does. The court takes the most direct and almost necessarily easiest way out. And if it passed it on the question of the effect of a treaty, naturally they would pursue that right down to its logical conclusion. But that was not tantamount to saying there was not some other way of dealing with poppies that were going to be converted into narcotics for use in America.

Mr. FISHER. Well, sir, the fact that the court put its decision on that ground indicates to me that it felt it was on stronger ground on this theory. That meant that it felt it was not on so strong ground on the theory which you advanced.

Senator SMITH. Was the other theory advanced and argued?

Mr. FISHER. Yes, sir, it was. It was referred to in the decision as an argument that was made. But it was answered on this ground.

Senator SMITH. Then you do not think that the Congress could legislate on the subject of poppy growing in the United States where that was going to lead to the production of narcotics?

Mr. FISHER. It would seem to me, sir, that in matters of this kind, as the court has decided in matters like Holland against Missouri, also Asakura versus Seattle, which is pawnshop regulation in the city of Seattle, the issue ought to be not whether the Congress could do it in the absence of a theory, but the clear issue, which was found by the district court in this case and found by the Supreme Court in Asakura versus Seattle—whether or not this was proper action under a treaty. And that has been the approach that the Supreme Court has consistently taken, and I believe to make it a hypothetical question, what you might or might not be able to do, if there were no treaty, throws you on the somewhat treacherous sands of interstate and foreign commerce in areas which we humbly submit might better be taken on a worldwide basis, even though the particular application of it involves no interstate and foreign commerce.

Senator SMITH. Now, you do not want to answer my question whether or not you believe that under the law and under the Constitution it is today the case that the Federal Legislature has a right to legislate on the growing of poppies where that growing is going to progress into the distribution of narcotics? You do not think Congress has that power?

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Mr. FISHER. The extent to which it has that power to go back into production and to deal with production is a doubtful question.

You can argue both ways on it.

Senator SMITH. I am just trying to get your legal opinion on it. We may want to use this in the future. I want to get your legal opinion on this question.

Mr. FISHER. At the present time, sir, I hesitate to give legal opinions on inherent powers. The matter seems to be now up.

Senator SMITH. I was not going that far.

Mr. FISHER. But in my opinion, the issue ought not to depend on that doubtful question. The issue ought to depend on whether or not there is a justified treaty which has been ratified by the Senate and which has to be put into effect.

I concede that you could argue both ways on this. But the very fact that the district court decided on this ground rather than the other would appear to indicate to me that he felt this was a sounder and a safer ground.

Senator SMITH. You subscribe to all district court opinions, then, I presume?

Mr. FISHER. I subscribe to one, sir, until it is reversed, just like there was considerable subscription to the Fujii case in the lower court before it was reversed.

Senator SMITH. I was thinking about the most recent case.

Mr. FISHER. I stick with them until they have been acted on by higher authority, sir.

Senator HENDRICKSON. Mr. Secretary, I assume from your discussion of the poppy situation that you feel that the enactment of this resolution, or the adoption of this amendment, or any amendment that has been offered, would prevent the exercise of the treaty-making powers which control the poppy situation.

Mr. BRUCE. Which control a situation of which the growing of poppies in California is only a minor element.

Senator HENDRICKSON. Yes, I agree.

Mr. BRUCE. But which has the great advantage of having gotten into the courts so that we can make use of it.

Well, I think we have covered the poppy case and the pawnbrokerage case, which affected the city of Seattle, which Mr. Fisher has just referred to.

Senator HENDRICKSON. Was that a district court case?

Mr. FISHER. No, sir, Supreme Court of the United States.

Mr. BRUCE. 1924. That involved the treaty with Japan.

Senator SMITH. That was the one written by Mr. Justice Butler?

Mr. FISHER. Yes, sir.

Senator SMITH. He was regarded as sort of reactionary, was he not? He was a very fine gentleman. I knew him and his family.

Mr. BRUCE. Well, I had better describe Justice Butler's case. I happen to know him quite well.

Senator SMITH. I knew his daughter and some members of his family, and I have admired him very much, even though he was somewhat reactionary.

Mr. BRUCE. I hope his legal opinions will stand the test of time, as in this case.

A good example is *Asakura* v. *Seattle* (265 U. S. 332), decided by the Supreme Court in 1924. That case involved a treaty with Japan

which provided that the citizens of the high contracting parties should have the right to reside in the territory of the other—

> to carry on trade * * * to own or lease and occupy * * * shops * * * to lease land for * * * commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established, and shall receive * * * the most constant protection * * * for their * * * property.

The city of Seattle passed an ordinance which provided that no person should enter the business of pawnbroking without a license and that a license should not be issued unless the applicant was a citizen of the United States. The Court held that the ordinance was invalid under the treaty. The opinion was written for a unanimous court by Mr. Justice Butler, who stated as follows:

> The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend "so far as to authorize what the Constitution forbids," it does extend to all proper subjects of negotiation between our Government and other nations (*Geofroy* v. *Riggs*, 133 U. S. 258, 266, 257: *In re Ross*, 140 U. S. 453, 463; *Missouri* v. *Holland*, 252 U. S. 416).

The statement that the treaty power does not extend "so far as to authorize what the Constitution forbids" first made in 1890 by Mr. Justice Field in *Geofroy* v. *Riggs* (133 U. S. 258), has never been retracted by the Court.

Certainly this principle, together with care on the part of the Executive and the additional safeguard of a watchful Senate, would seem to provide a satisfactory answer to the second question and make a constitutional amendment unnecessary.

The third and final question is whether a treaty should become the law of the land without a subsequent action by the Congress. Article III of the constitutional amendment proposed by Senate Joint Resolution 130 is directed solely to this point. In Justice Story's book on the Constitution, he set forth the reasons for the rule in our Constitution. He said:

> In regard to treaties, there is equal reason why they should be held, when made, to be the supreme law of the land. It is to be considered that treaties constitute solemn compacts of binding obligation among nations; and unless they are scrupulously obeyed and enforced, no foreign nation would consent to negotiate with us; or if it did, any want of strict fidelity on our part in the discharge of the treaty stipulations would be visited by reprisals or war. It is, therefore, indispensable that they should have the obligation and force of a law, that they may be executed by the judicial power, and be obeyed like other laws.

See II Story's Commentaries on the Constitution (fifth edition) paragraph 1838.

The rule so well stated by Justice Story, of course, is based on the assumption that the treaty in question was intended to become operative without any farther action by the parties. Chief Justice Marshall laid down the rule in *Foster* v. *Neilson* (2 Peters 253) that—

> when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the Court.

A great deal has been said about the case of *Fujii* v. *State of California*, where an intermediate State court held that the United Nations Charter invalidated the California alien land law. Some appeared

to fear that this case showed that the courts could no longer be trusted to follow the rule which had been law since Chief Justice Marshall's decision.

You have all probably learned by now that on April 17, 1952, the Supreme Court of California reversed the lower court in this case and ruled that the United Nations Charter did not invalidate the California land law. Since so much has been said about this case, and since this decision is an important precedent in connection with treaties, I should like to read to you several short excerpts from the opinion of Chief Justice Gibson of California:

> The provisions in the Charter pledging cooperation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justifiable rights in private persons immediately upon ratification. Instead, they are framed as a promise of future action by the member nations. Secretary of State Stettinius, chairman of the United States delegation at the San Francisco Conference where the Charter was drafted, stated in his report to President Truman that article 56 "pledges the various countries to cooperate with the Organization by joint and separate action in the achievement of the economic and social objectives of the Organization without infringing upon their rights to order their national affairs according to their own best ability, in their own way, and in accordance with their own political and economic institutions and processes."
>
> The humane and enlightened objectives of the United Nations Charter are, of course, entitled to respectful consideration by the courts and legislatures of every member nation, since that document expresses the universal desire of thinking men for peace and for equality of rights and opportunities. The Charter represents a moral commitment of foremost importance, and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs. We are satisfied, however, that the Charter provisions relied on by plaintiff were not intended to supersede existing domestic legislation, and we cannot hold that they operate to invalidate the alien land law.

In short, the California Supreme Court has confirmed the views of the Senate, as indicated by Senator Bricker, to the effect that the Charter was not intended to "supersede a large body of Federal or State legislation."

I particularly wanted to call your attention to those excerpts from the court's opinion because of the reference therein to the report which Secretary Stettinius made. That report made it clear that the United States representatives, in negotiating the United Nations Charter, had no intention of using the treaty power to change our basic political and social institutions.

I am aware that it has been argued that the United States is alone in having a constitutional system under which treaties can become automatically the supreme law of the land. This statement appears to me to be quite misleading. I would like to submit for the record an analysis of the constitutional provisions of other countries dealing with this subject.

This survey shows that while in most countries participation by the legislature is required to apply a treaty which conflicts with existing law, this action is almost universally taken as part of the same action by which the treaty is ratified. This is generally by simple majority. The more important of these countries have parliamentary systems under which only a majority vote in the lower house is significant.

Section 3 of Senate Joint Resolution 130 would require two separate and specific actions in order to redeem the pledge made by a treaty which required the altering or abridging of State or Federal

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law. No other country in the world, so far as careful study of the laws and practices of other countries reveals, is required by its constitution or constitutional practices to follow such a double procedure.

We do not believe that the reasons advanced for the proposed amendment outweigh the reasons set forth by Justice Story. When the United States ratifies a treaty it assumes an international obligation. If the treaty is one intended to be self-executing it should go into effect immediately upon ratification. The United States should not adopt a constitutional procedure which would require it immediately to reconsider whether it could live up to the obligation it had assumed.

So far, Mr. Chairman, I have directed my comments chiefly to the treaty power aspect of Senate Joint Resolution 130. With respect to executive agreements, I understand that the sponsors of this resolution had in mind the type of agreement that the President makes without securing the prior or subsequent approval of the Congress. As this resolution now reads, it could well be construed to include executive agreements which have received the prior or subsequent approval of the Congress. Section 4 reads:

> Executive agreements shall not be made in lieu of treaties.
>
> Executive agreements shall, if not sooner terminated, expire automatically 1 year after the end of the term of office for which the President making the agreement shall have been elected, but the Congress may, at the request of any President, extend for the duration of the term of such President the life of any such agreement made or extended during the next preceding Presidential term.
>
> The President shall publish all executive agreements except that those which in his judgment require secrecy shall be submitted to appropriate committees of the Congress in lieu of publication.

Mr. Chairman, the Department of State prepared several studies on the subject of executive agreements which we submitted to the Senate Foreign Relations Committee with respect to Senate Joint Resolution 122, and copies of these studies have been submitted to this subcommittee.

The information contained in them serves to place the question of executive agreements in proper perspective. I should like to summarize it now in the context of Senate Joint Resolution 130.

Obviously, if Congress adopts a resolution authorizing the President to enter into a certain international agreement or if the President negotiates an agreement which expressly is to be submitted to Congress and to be made effective by congressional legislation, such an agreement—although called an "executive agreement" to distinguish it from a treaty—does and should have the same legal character and effectiveness as any other statute or public law of the United States.

As a matter of record the great majority of international agreements other than treaties have included and continue to include one of these two forms of congressional participation. It may be of interest to illustrate the kinds of agreements so made by some examples. The following are illustrations of agreements made pursuant to prior authority given the President by legislation:

One hundred and eleven agreements governing technical aspects of commercial aviation have been made within the framework of the International Civil Aviation Convention, which is a treaty, and pursuant to certain statutes; 105 economic and technical agreements, including point 4 agreements, have been made under the Economic

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Cooperation Act of 1948 and the Foreign Aid Appropriation Act of 1949; and 25 mutual defense assistance agreements have been made under the Mutual Defense Assistance Act of 1949 and the Mutual Security Act of 1951.

The Institute of Inter-American Affairs Act has been the statutory basis for over 100 agreements setting up cooperative programs in the fields of health and sanitation, agriculture, development of productive resources, and education. Other examples are agreements in the fields of shipping, radio communications, taxation, the work of American military and technical missions abroad; and there are many others.

The second category of agreements which have come into effect through congressional action is that involving subsequent approval or implementation by legislation. Of particular importance within this category has been congressional approval of United States participation in the work of international organizations such as the International Labor Organization, the International Monetary Fund and Bank, the Food and Agriculture Organization, and the World Health Organization. The United Nations trusteeship agreement under which the United States became administering power for the former Japanese mandated islands in the Pacific was approved by the Congress before it entered into force.

There remains a portion of the total number of international agreements other than treaties which are in fact entered into and given effect by Executive action alone. Of this portion a large percentage in turn are concerned with purely military arrangements incident to war or arising from the presence of American Armed Forces abroad. These include armistice agreements; understandings with certain countries at the end of the Second World War to the effect that United States forces were present in the other country with its permission; arrangements regarding jurisdiction over United States forces abroad, their movement and treatment and aid to be given them by foreign countries; arrangements concerning our military occupation of enemy territory; and, in Korea, agreements arranging such matters as the use of a Swedish Red Cross field hospital and a Norwegian mobile surgical hospital.

Senator HENDRICKSON. Mr. Secretary, did we consummate an agreement with Western Germany giving Western Germany jurisdiction, civil and criminal jurisdiction, over our troops?

Mr. BRUCE. No, sir. The status of our troops is covered by certain articles in this agreement which was presented to you yesterday. I think it will be satisfactory. It will give generally a status accorded to any of the nations of the Western Allied countries.

Senator HENDRICKSON. When I was over there last fall Mr. McCloy was discussing the possibility of surrendering jurisdiction of our troops, civil and criminal, to the Western German Government. I know it gave the military a great deal of concern.

Mr. BRUCE. We have had a great deal of discussion about it. What the final upshot was I do not know. It was heading toward a resumption by the German Federal Government of civil jurisdiction and criminal jurisdiction, but I would not like to go on record with that because I do not know. They gave Mr. McCloy a great deal of difficulty. The Army was rather insistent on retaining as much jurisdiction as possible.

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Senator HENDRICKSON. Under the rules of land warfare.

Mr. BRUCE. Yes.

They also include certain types of purely executive agreements made by the President in his conduct of the foreign relations of the United States. One historic example, of course, was the settlement of the Boxer Rebellion of 1900. The various countries concerned signed a final protocol at Peking in 1901. This protocol was not submitted to the Senate and it was not considered necessary that it should be.

The application of section 4 of the proposed amendment to this type of agreement would in our judgment be unwise. If the design of that section is to prohibit the President from exercising his historic constitutional powers to conduct the foreign relations of the United States and to act as Commander in Chief of the Armed Forces, it is apparent that a basic alteration in the structure of our Government is contemplated.

It apparently would require the participation of the Congress in functions which the framers of the Constitution thought should be vested exclusively in the executive branch of the Government. If anything, conditions today require more urgently than ever that the President be in a position to employ his traditional powers. As a practical matter, neither the Senate nor the Congress as a whole is set up and equipped to discharge this function with respect to the cases that would come before them as a result of the conduct of foreign relations.

Upon the basis of our analysis of Senate Joint Resolution 130, Mr. Chairman, I submit the following conclusions:

1. The assumption is unwarranted that the President, the Senate, and the courts will abuse the treaty power and alienate the constitutional liberties of American citizens. There is absolutely nothing in the record to support this assumption.

2. Senate Joint Resolution 130 as now drafted is unclear in several important respects. It would appear, however, to prevent many treaties which have been beneficial to the United States and to its citizens.

3. Senate Joint Resolution 130 also would appear to place serious handicaps upon the United States Government in the conduct of its foreign relations. It would appear to impose serious and unnecessary limitations upon the treaty-making authority—the President and the Senate—so that this Government would be unable to enter into beneficial and humanitarian treaties.

4. Finally, this resolution would alter the fundamental division of powers between the executive, legislative, and judicial branches which is the basic structure of our constitutional system. It would burden the already overburdened legislative branch with historically and fundamentally executive functions while it seriously impairs the effectiveness of the Executive in the conduct of the foreign relations of the United States.

Senator SMITH. Thank you very much. We appreciate your giving us the benefit of your views.

Do you have anything else, Mr. Fisher?

Mr. FISHER. No, sir.

Senator SMITH. We hope these men over here will not denominate all this talk we have as poppycock this morning.

Mr. Turlington is the next witness. Please identify yourself, sir.

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